Supreme Court, U.S.
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No. 10-237

IN THE
Supreme Court of the United States

POLICE OFFICER CRAIG BUONORA,

Petitioner

v.

DARRYL T. COGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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I

THE SECOND CIRCUIT'S CREATION OF AN "EXTRA-JUDICIAL CONSPIRACY EXCEPTION" TO THE *BRISCOE* RULE OF ABSOLUTE IMMUNITY CONFLICTS WITH THE CONTROLLING DECISION OF THE UNITED STATES SUPREME COURT, AS WELL AS THE HOLDINGS OF THE EIGHT (8) OTHER CIRCUIT COURTS OF APPEALS TO HAVE CONSIDERED THIS ISSUE, AND, THEREFORE, COMPELLING REASONS EXIST TO GRANT THIS PETITION.

While spilling much ink in an attempt to justify the Second Circuit's creation of an extra-judicial conspiracy exception to the *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), rule of absolute immunity, Coggins inexplicably fails to deal with the singular issue presented on this petition; that is, that given the extraordinary split in Circuits presented here and discussed more fully below, together with the *Briscoe* holding itself, there are "compelling reasons" pursuant to this Court's Rule 10(a) for granting our request and permitting this matter to be fully briefed and heard by this Court.

In other words, whether we are correct that the Second Circuit should follow the other Circuit Courts of Appeals which have held that a witness who conspires to commit perjury is absolutely immune from §1981 and §1983 civil liability, or whether the respondent is correct, the conflict between the Circuits and the holding in *Briscoe* itself

are "compelling reasons" requiring the attention of this Court.

A. The *Briscoe* Holding

It is important to resolve the issue of absolute immunity "'at the earliest possible stage in litigation.' *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*." *Pearson v. Callahan*, 555 U.S. ---, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009). Moreover, this Court's discussion in *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) holds that "*immunity from suit*... is effectively lost if a case is erroneously permitted to go to trial. [Emphasis in original.]"; *see, also, Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953, 173 L.Ed.2d 868 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).") (For a full discussion see Points I and II in our Petition pp. 9-20.)

The decisions of the United States Court of Appeals for the Second Circuit, *San Filippo v. U.S. Trust Co. of N.Y.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied* 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), and *Dory v. Ryan*, 25 F.3d 81 (2nd Cir. 1994), conflict with the decision of this Court in *Briscoe*. Therefore, consideration by this Court is compelling and necessary to maintain uniformity of the Court's decisions among the lower courts.

San Filippo, and *Dory*, create an "extra-

judicial conspiracy" exception to *Briscoe* which conflicts with the authoritative decisions of each of the other Eight (8) Circuit Courts of Appeals that have addressed this issue.

In *Briscoe*, it was noted that at common law, all persons who were integral parts of the judicial process were "provided absolute immunity from subsequent damages liability." *Id.* at 335. *Briscoe* dealt specifically with the question of whether a police officer who testified falsely at trial could be held liable for damages under 42 U.S.C. §1983.

This Court reasoned: "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions... and may be prosecuted subsequently for perjury." *Id.* at 342. The Court recognized that "[s]ubjecting... police officers to damages liability under §1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." *Id.* at 345.

The District Court relied upon the Second Circuit's holdings in *San Filippo*, and *Dory*, in denying petitioner's motion to dismiss pursuant to FRCP 12(b)(6) and for summary judgment pursuant to FRCP 56 -- despite respondent's apparent claim to the contrary (see p. i of respondent's Brief in Opposition).

San Filippo extended the *Briscoe* grant of immunity to witnesses testifying in a grand jury proceeding but also created an "extra-judicial

conspiracy exception" to *Briscoe*'s absolute immunity. 737 F.2d at 255. *Dory* held that the "extra-judicial conspiracy exception" applies to police officers. 25 F.3d at 84.

The Second Circuit thereby created an exception where none was intended. No other Circuit Court has adopted these holdings.

> Exceptions to absolute immunity should not be created freely. That malicious or corrupt acts are protected, *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967), indicates how solidly the doctrine of absolute immunity is entrenched in our legal system. To defeat this doctrine by pleading a conspiracy would be to create an exception where none was intended.

Moses v. Parwatikar, M.D., 813 F.2d 891, 893 (8th Cir. 1987) , *cert denied*, 484 U.S. 832, 108 S.Ct. 108, 98 L.Ed.2d 67 (1987). *See, too, Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991).

B. All Eight (8) Circuit Courts of Appeals to have considered the "extra-judicial conspiracy exception" have rejected the Second Circuit's reasoning.

With the exception of the Second Circuit, all other Circuit Courts of Appeals (make that Eight (8) Circuits and counting) that have considered this issue have held that a witness is entitled to the *Briscoe* grant of absolute immunity from liability from both the witness' testimony and from any

conspiracy to commit perjury. *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993); *Mowbray v. Cameron County, Tex.*, 274 F.3d 269 (5th Cir. 2001), *cert denied* 535 U.S. 1055, 122 S.Ct. 1912, 152 L.Ed.2d 822 (2002); *Alioto v. City of Shively, Kentucky*, 835 F.2d 1173 (6th Cir. 1987); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Moses v. Parwatikar, M.D., supra* (8th Cir.); *Franklin v. Terr*, 201 F.3d 1098 (9th Cir. 2000); *Miller v. Glanz, supra* (10th Cir.); and *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999).

At the time we filed our Petition we were under the misapprehension that only seven (7) Circuits had rejected the Second Circuit's extra-judicial conspiracy exception to *Briscoe*. However, we have since learned that the Fifth Circuit has also concluded (*Mowbray, supra*) that the Second Circuit's rationale should be rejected.

Moreover, while the Fourth Circuit Court of Appeals has not yet addressed the issue in the context of a 1983 action, it has held government witnesses, including prosecutors alleged to have suborned perjury, immune from civil liability claims for perjured grand jury testimony as well as for conspiracy (*Lyles v. Sparks*, 79 F.3d 372 (4th Cir. 1996). That holding was applied to a 1983 action in *Marshall v. Odom*, 156 F.Supp.2d 525 (D. Maryland, Southern Division, 2001) in which the Court considered the Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits' reasoning and rejected the Second Circuit's holding in *Dory*.

In the instant action, petitioner committed perjury, was subsequently indicted, and pled guilty --

precisely what is contemplated by *Briscoe* and the Eight (8) Circuit Courts of Appeals which have rejected the Second Circuit's holding.

This Court's Rule 10(a) demonstrates that a "compelling reason[]" for granting a Petition for a Writ of Certiorari may lie in the existence of the actions by a United States Court of Appeals in "enter[ing] a decision in conflict with the decision of another United States Court of Appeals on the same important matter". In this case, the "compelling reasons" for such a grant are underscored by Eight (8) Circuit Courts of Appeals' repudiation of the Second Circuit's holdings which conflict with the decisions of every other Circuit to have considered this issue.

II

PETITIONER IS ENTITLED TO RESOLUTION OF THE ABSOLUTE IMMUNITY QUESTION AT THE EARLIEST POSSIBLE STAGE OF LITIGATION.

In *Pearson v. Callahan, supra*, a unanimous Supreme Court "stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (citing *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991) (*per curiam*)). Moreover, petitioner is entitled to absolute immunity not just as a defense but from suit itself. *Mitchell v. Forsyth, supra*, 472 U.S. 511, 512, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *See, Saucier v. Katz*, 533 U.S. 194, 200-201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). *See, too, Shmueli v. The City of New York*, 424 F.3d 231, 236 (2nd Cir. 2005).

This was reiterated recently in *Iqbal, supra*, where this Court reversed the Second Circuit's denial of a motion to dismiss on qualified immunity grounds, reasoning that "the basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, *including 'avoidance of disruptive discovery.' Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)...." *Id.* at 1953 (emphasis added). In *Iqbal*, this Court dismissed Plaintiff's Complaint *prior to discovery*.

Accordingly, Officer Buonora is entitled to this determination at the earliest possible stage, especially where the District Court was presented with ample admissible evidence -- which was

undisputed -- to determine these issues.

III

THE DISTRICT COURT ERRED IN DETERMINING THAT THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE AND THAT THE RESPONDENT'S AFFIDAVITS COMPLIED WITH RULE 56(f). MOREOVER, THE CIRCUIT COURT WAS REQUIRED TO CONSIDER THESE ISSUES *DE NOVO*.

A. Buonora cannot be viewed as a complaining witness.

Coggins erroneously states that the underlying motion was a Rule 12(b)(6) motion to dismiss (see p. i of respondent's Brief in Opposition). The motion for summary judgment was properly before the District Court. There was no request for, or denial of, conversion of a Rule 12(b)(6) motion to a Rule 56 motion. Rather, Buonora received the District Court's permission to make the Rule 56 motion for summary judgment.

The underlying motion herein was in fact one for summary judgment pursuant to Rule 56(a). As such, both the District Court and the Circuit Court of Appeals were provided with all evidentiary materials needed to prove that Buonora could not be found to be a complaining witness and therefore was entitled to summary judgment. No further discovery is

needed.[1]

Petitioner submitted evidence in admissible form consisting of copies of Nassau County Police Department reports, court records related to his perjury prosecution, and transcripts of petitioner and Vara's grand jury testimony. (See footnote 1 below.) Coggins submitted records of the Floral Park Police Department. The police records were business records and would be admissible at trial. F.R.E. 803(6); *Saks Int'l, Inc. v. M/V Exp. Champion*, 817 F.2d 1011 (2nd Cir. 1987). The submitted court records were certified and similarly self-authenticating.

Moreover, Coggins did not dispute Buonora's claim of absolute immunity in either his FRCP 56(f) Affidavit or his E.D.N.Y. Local Rule 56.1 Statement of Material Facts. Coggins failure is considered an admission under FRCP 56(e). *United States v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987). Among the admissions is that another officer arrested Coggins; another officer interviewed Coggins; the felony complaints were not prepared by Buonora; and Buonora did not testify at any evidentiary proceedings. Therefore, Buonora could not be found to be a complaining witness.[2]

The District Court only considered "the

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[1] This Court has the power to call up the Record from the Second Circuit. Given respondent's claim, we request that it do so. (See A.33-A.46 below.)

[2] See Petition, p. 27, footnote 6.

complaint and Coggins' Rule 56(f) affidavit [to conclude] that Buonora's motion for summary judgment is premature," and never considered the admissible evidence.

The Circuit Court was required to review *de novo* the denial of summary judgment when based on assertions of absolute and/or qualified immunity. *See, Walczyk v. Rio*, 496 F.3d 139, 153 (2nd Cir. 2007); *See also, Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999).

Summary judgment should be granted when "'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" *Concepcion v. U.S.*, 298 F.Supp.2d 351, 355 (E.D.N.Y. 2004) (*quoting*, FRCP 56 (c); *see, Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 9 L.Ed.2d 265 (1986); *TransSport, Inc., v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2nd Cir. 1992) (*citing*, *Bryant v. Maffucci*, 923 F.2d 979, 982 (2nd Cir. 1991).

Petitioner set before the District Court a *prima facie* case entitling him to summary judgment based upon absolute immunity from suit arising out of his grand jury testimony pursuant to *Briscoe*. Petitioner also set forth a *prima facie* case establishing as a matter of law that he is not a complaining witness, based upon *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). *Malley* is clearly distinguishable. In *Malley*, a police officer submitted a false affidavit for an arrest warrant at an *ex parte* hearing.

Coggins did not dispute any of the factual assertions related to Buonora's claim of absolute witness immunity.

Buonora's assistance at the scene and subsequent grand jury testimony did not institute the proceeding against Coggins and therefore did not make him a complaining witness. *See, Sykes v. James*, 13 F.3d 515, 520 (2nd Cir. 1993), *cert denied* 512 U.S. 1240, 114 S.Ct. 2749, 129 L.Ed.2d 867 (1994).

The failure to dispute the facts relevant to the issue of absolute immunity are to be considered by the Court to be "admissions" under FRCP 56(e). *See, E.E.O.C. v. Wal-Mart Stores, Inc.*, 2001 WL 1725300 at *3 (Dist. Ct., W.D.N.Y. 2001); *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2nd Cir. 1992).

Once again, Coggins offered no evidence in opposition but for a deficient FRCP 56(f) affidavit. Nowhere in Coggins' Rule 56(f) affidavit did he state where, or from whom, Coggins hoped to obtain the necessary information to establish that Buonora was a complaining witness and, thus, subject to *Malley*. FRCP 56(f) requires "what facts are sought and how they are to be obtained...." The District Court abused its discretion in concluding that summary judgment was premature in light of the erroneous credit given to Coggins' defective Rule 56(f) affidavit. The District Court abused its discretion and erred in finding that the Respondent's Rule 56(f) affidavit "wholly complie[d] with the standard the Second Circuit has set forth...."

Denial of Petitioner's motion for summary judgment raised before the Circuit Court *de novo* the District Court's entire memorandum and decision. *De novo* review entails "study[ing] the reasoning on which [the District Court's decision] is based." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163 at 168 (2nd Cir. 2001). Since the District Court evaluated the Respondent's Complaint under 12(b)(6), this "reasoning" was squarely before the Second Circuit when reviewing the Petitioner's entitlement to absolute immunity *de novo*. *See*, *Walczyk*, 496 F.3d at 153; *Thomas v. Roach*, 165 F.3d at 142.

Petitioner is entitled to this absolute immunity since he was not a complaining witness in the prosecution of the respondent. His only role, other than assisting Officer Vara at the scene, was to testify, albeit falsely, before the grand jury. Therefore, petitioner is entitled to absolute immunity, both as a defense and from suit.

Respondent relies on *Mejia v City of New York*, 119 F.Supp.2d 232 (E.D.N.Y., 2000) in support of his claim that petitioner was a complaining witness, *Mejia* essentially holds, contrary to *Briscoe*, that no witness who testifies perjurously can be immune from civil liability. The court stated: "[O]ne who gives false information to a prosecutor that he knows will induce a prosecutor to... *continue proceedings* against a plaintiff, knowingly violates the law and is not entitled to *qualified* immunity for his actions." 119 F. Supp.2d 232, 273 (emphasis added). For better or worse, no witness testifies without some communication with a prosecutor. Therefore, according to *Mejia*, every witness who testifies is a

complaining witness and no witness can be immune from civil liability.

In support, the court in *Mejia* relied on *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123 (2nd Cir. 1997). However, the issue in *Ricciuti* was the fabrication of *non-testimonial* false evidence, not false testimony. The claim in the instant case involves false testimony, not the fabrication of non-testimonial evidence regarding which there is no issue that there is no immunity. In other words, the *Mejia* court radically applied the law in an irrelevant area to *Briscoe* immunity.

In the instant case, petitioner answered a fellow officer's call and then had no further involvement in the arrest until his grand jury testimony. He did not initiate respondent's prosecution.

The District Court's denial of summary judgment was completely inconsistent with the declaration in *Iqbal*, 129 S.Ct. at 1949-50 that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -- 'that the pleader is entitled to relief.'" *Id.*, 129 S.Ct. at 1950 (*quoting*, FRCP 8(a)(2)).

Finally, it would seem that a failure of the lower Courts to conclude that petitioner has failed to demonstrate that he is not a complaining witness would suggest that the very question of what constitutes a complaining witness, where petitioner has done nothing more than assist a colleague at the

scene of a crime and testify before a grand jury, albeit falsely, may itself be viewed as "compelling reasons" to grant this petition so that this Court may set forth a "bright line" beyond which neither the District Courts nor Circuit Courts may go.

Wherefore, this Petition should be granted pursuant to this Court's Rule 10(a) since there are "compelling reasons" for doing so grounded in the fact that the Second Circuit's creation of an "extra-judicial conspiracy exception" to *Briscoe v. LaHue* conflicts not only with this Court's holding but with the decisions of all Eight (8) Circuit Courts of Appeals which have considered this issue and have rejected the Second Circuit's holdings and rationale, together with such other and further relief as this court deems just and proper.

Respectfully Submitted

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